

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.94 OF 2010

Shantaram Tukaram Sarfare.	]	
Aged – 62 years, Occupation – Retired,	]	
R/A – Sheetal CHS Ltd., Flat No.C-16/14,	]	
3 rd Floor, Nagari Niwara Parishad,	]	
General Vaidya Marg, Goregaon (East),	]	
Mumbai – 400 065.	]	... Appellant

Versus

Sandhya Shantaram Sarfare.	]	
Aged – 56 years, Occupation – Service,	]	
R/A – Flat No.108, 1 st Floor, Maheshwari	]	
Ganesh Kunj CHS Ltd., Kondivita, J. B. Nagar,	]	
Andheri (East), Mumbai – 400 059.	]	... Respondent

Mr. Chetan Akerkar for Appellant.
 Mr. R. V. Sankpal for Respondent.
 Mr. Shantaram Tukaram Sarfare, Appellant, present in person.

**CORAM :- K. K. TATED &
 SARANG V. KOTWAL, JJ.**

RESERVED ON :- 05 JANUARY, 2018

PRONOUNCED ON :- 12 JANUARY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is preferred by the Appellant against the Judgment and Order dated 07/05/2010 passed by the learned Judge of Family Court No.4, Mumbai, whereby the Marriage Petition

No.A-1355 of 2006 filed by the Appellant for divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 was dismissed.

2. It is the case of the Appellant, in the aforementioned petition filed by him, before the Family Court that, he got married with the respondent according to the Hindu Vedic rites and rituals on 29/05/1972 at V.T., Mumbai. It is further mentioned in the said petition that after their marriage, the couple stayed together at Andheri. Initially, the relations between them were cordial and subsequently because of the Respondent's nature, their relations became strained. The Appellant has pleaded in the petition that the Respondent lodged frivolous and vexatious complaints at the police station and also in the Courts. The Respondent had also involved the brothers and sisters of the Appellant in a criminal case and the Appellant has further mentioned that those criminal cases have resulted in acquittal. It is further his case that, the Respondent resorted to sending complaints to the Appellant's employer and maligned his image. The Appellant has further pleaded that the Respondent had created hurdles in his increment, benefits and privileges related to his job. Thus, the Respondent caused continuous harassment to the Appellant. The Appellant had further pleaded that the Respondent is occupying the residence which was purchased by him. It is his case that the Appellant always treated her with love, affection but there was no reciprocation from the Respondent and, in fact, he was continuously humiliated and ultimately the Appellant had to leave his own matrimonial home and live separately. Apart from

the criminal proceedings, the Respondent had lodged various civil proceedings and, in fact, the Respondent herself had filed a petition for divorce vide Petition No.B-149 of 1996. Thus according to him, he was left with no option but to file the petition for divorce on the ground of cruelty. The Appellant filed the Judgments and Orders in the past proceedings in his petition for divorce.

3. The Respondent, on service, entered her appearance and filed her Written Statement. Besides denying all the averments in the petition, in her Written Statement, the Respondent stated that all the complaints which were filed by her were genuine and in one of the cases, the order of acquittal is challenged before this Court and is pending its final disposal. It is further her case that she had lost her job and had no financial support. According to the Respondent, she herself, with the help of her family and colleagues, had purchased the premises at Andheri. The Respondent has further stated in her Written Statement that the Appellant was staying in adultery and therefore she had filed a Petition for divorce. It is further her case that the Appellant had pleaded for reconciliation and therefore, she did not take steps in the said petition and therefore the petition was dismissed for non-prosecution. She has further stated that she had filed petition for maintenance and orders were passed in her favour for maintenance. The Respondent has mentioned some instances wherein the Appellant had assaulted her after consuming alcohol. The Respondent has alleged in her Written Statement that the Appellant had an affair with one lady since 1993 and since the

Respondent had objected to the said relationship, she was ill-treated by the Appellant. It is her case that the Appellant himself had deserted her without reasonable cause and excuse and that he was taking advantage of his own wrong and that the present petition for divorce was filed belatedly, almost after 10 years, and therefore the petition should be dismissed.

4. During the course of the proceedings before the Family Court, the Appellant tendered his Affidavit in lieu of his examination-in-chief and was cross-examined by the Respondent. On the other hand, the Respondent also gave her evidence and was cross-examined by the Appellant. After recording the evidence and hearing the arguments, the learned Judge was pleased to dismiss the petition for divorce filed by the Appellant with the finding that the Appellant had failed to prove that he was subjected to cruelty at the hands of the Respondent and therefore, the Appellant was not held to be entitled for a decree of divorce and ultimately the petition was dismissed.

5. We have heard Mr. Chetan Akerkar, the learned Counsel for the Appellant and Mr. R. V. Sankpal, the learned Counsel for the Respondent. With their assistance, we have gone through the evidence and the impugned Judgment. After considering their submissions, following points arise for our determination. The said points and the findings thereon are as under :

SR. NO.	POINTS	FINDINGS
1	Whether the appellant has made out the case for setting aside the impugned Judgment of the learned Judge of the Family Court ?	Yes
2	Whether the Appellant has proved that he was treated with cruelty by the Respondent ?	Yes
3	Whether the Appellant is entitled for the Decree of divorce ?	Yes
4	What Order ?	As per the Final Order

6. Mr. Chetan Akerkar, the learned Counsel for the Appellant, submitted that the impugned Judgment is very cryptic and the learned Judge has not even considered and has not discussed the evidence tendered by both the parties. The learned Judge has not considered the import of the decisions in various proceedings between the parties. The learned Judge has wrongly observed that the Appellant has not specified that the contents of the complaints against him were totally false and that the Appellant had not specified the real facts in respect those complaints. Mr. Akerkar further submitted that a number litigations filed by the Respondent, either on her own or at her instance, show that there was continuous harassment and treatment of cruelty to the Appellant and the Appellant's innocence is vindicated by his acquittal in the criminal proceedings. Even the family members of the Appellant were not spared and were dragged in a criminal prosecution. He further submitted that the divorce petition filed by the Respondent was not pursued by her and was dismissed.

The said order was not challenged neither any efforts were made by the Respondent for getting the said order set aside and therefore, the said order had attained finality. He further submitted that the allegations of adultery made by the Respondent were unsubstantiated and such allegations, by themselves, amounted to cruelty. He further submitted that since the Appellant was a public servant, continuous complaints to his employer were affecting his career prospects and were causing mental harassment to him. He further submitted that the allegations of adultery could not have been gone into, particularly when the lady in question with whom the Appellant was residing, was not made a party in these proceedings and no findings could have been recorded against her or for that matter, against the Appellant in that regard. He further submitted that the electoral roll at Exh.31 though mentions the name of another lady staying at the said address, and bearing the name of the present Appellant as her middle name, it does not mean that the evidence is trustworthy and there is no evidence to show as to how that entry came into existence. Mr. Akerkar relied on the observations of the Hon'ble Supreme Court in the case of *Naveen Kohli Vs. Neelu Kolhi*¹ wherein the Hon'ble Supreme Court has explained as to what facts would constitute cruelty and has observed that the repercussions of all the criminal and other proceedings between the parties should be seen in proper perspective. Mr. Akerkar lastly submitted that on humanitarian ground, the Appellant is willing to continue paying the monthly maintenance allowance which he has been paying and that he shall not raise any

¹ I (2006) DMC 489 (SC)

dispute in respect of the flat where the Respondent is residing at present.

7. As against these submissions, Mr. R. V. Sankpal, the learned Counsel for the Respondent, submitted that the Appellant is in relationship with another lady since 1993 causing cruelty to the Respondent. He further submitted that the Appellant did not maintain the Respondent properly and always treated her with cruelty which is clear from the criminal proceeding instituted by the Respondent. He has further submitted that though the Appellant is acquitted in those criminal proceedings, in one of the proceedings, the Appeal is admitted and is pending before this Court. He further submitted that the Appellant was acquitted as he was given benefit of doubt which does not mean that the Respondent was not treated with cruelty as alleged by her. He further submitted that the Voter's List Exh.31 clearly shows that the Appellant was residing with another lady and that lady was being treated as his wife and thus he was living in adultery which amounted to cruelty to the Respondent and therefore the Appellant does not deserve the grant of Decree of divorce in his favour on the ground of cruelty by the Respondent. He further submitted that since 1996, the Appellant and the Respondent are residing separately and the reconciliation is not possible and the marriage is irretrievably broken. He further submitted that though there is no possibility of reconciliation, still the Respondent is opposing the grant of Decree of divorce, firstly, because she has not treated him with cruelty. Secondly, the Appellant himself had treated

her with cruelty and thirdly, she is justifiably getting medical treatment as she has the status of the Appellant's wife and the Appellant was employed with the Railways. He further submitted that the Respondent is not keeping good health and therefore not being divorced, has its own importance to her.

8. We have considered the rival submissions. The compilation of the Judgments and the Orders passed in the previous proceedings showed that the following proceedings arose between the parties.

(i) Marriage Petition No.B-149 of 1996 was filed by the Respondent against the Appellant in the Family Court at Bandra for Decree of divorce. She had alleged in the said petition that the Appellant had admitted to her that, since about two years prior to 1995, he had performed marriage with another lady and the Appellant was residing with her. She had alleged that the Appellant had assaulted her mercilessly causing injuries and she had stated that she had no support and needed maintenance. This petition was filed in December 1995. However, she did not take any steps to serve the Appellant and ultimately, the petition was dismissed by the order dated 05/06/1996.

(ii) The Respondent had filed a police complaint against the Appellant under Sections 498A and 494 of the IPC which resulted in a police case vide C.C.No.2/P/1997 which was tried before the

Metropolitan Magistrate, 10th Court, Andheri, Mumbai and vide the Judgment and Order dated 14/07/2004, the Appellant was acquitted. The said Judgment and Order is challenged by the Respondent before this Court and the Appeal was admitted and is pending final decision.

(iii) C.C.No.237/SW/2005 was instituted by the Respondent against the Appellant, his two brothers and a married sister, by way of a private complaint under Sections 323, 504 and 506 (II) of the IPC. At the conclusion of the trial, all these accused were acquitted by the Metropolitan Magistrate, 45th Court, Kurla, Mumbai, vide his Judgment and Order dated 30/01/2006. The said Judgment and Order was not challenged further and has attained finality.

(iv) Petition No.E-131 of 1997 was filed by the Respondent before the Judge, Family Court No.4, Mumbai, claiming maintenance under Section 125 of the Cr.P.C. from the Appellant and it appears that ultimately, the maintenance of Rs.1,200/- per month was granted to her in this proceeding.

(v) The Respondent had filed Petition No.C-2 of 2002 before the Judge, Family Court No.4, Mumbai, for maintenance under the Hindu Adoption and Maintenance Act, 1956 and vide the Judgment and Decree dated 30/02/2003, the Respondent was granted maintenance of Rs.3,000/- per month inclusive of the maintenance of Rs.1,200/- per month granted under Section 125 of the Cr.P.C.

9. Besides the above documentary evidence, the Appellant tendered his Affidavit in the form of examination-in-chief. In the said Affidavit, all the averments in his petition were repeated. In his cross-examination conducted on behalf of the Respondent, the Appellant denied that he was living in adultery with another lady. He denied the incident where the Respondent has alleged that he had assaulted her under influence of liquor. He has further stated in his cross-examination that he was arrested and was in custody for 8 days before being released on bail in connection with the criminal complaint filed by the Respondent in the MIDC Police Station. Even the Respondent tendered her Affidavit in lieu of examination-in-chief where she repeated the averments in her Written Statement. She also produced the case-papers from the Cooper Hospital and a certified copy of her FIR. She claimed that because of the Appellant's adulterous and cruel attitude, she has suffered mentally as well as physically. She tendered Voter's List at Exh.31 wherein the name of the lady was mentioned showing the Appellant's name as her middle name and showing the same address as that of the Appellant. In her cross-examination, she had admitted that she was blaming the Appellant for his incapacity which resulted in the couple remaining childless.

10. Having gone through the entire evidence, we find that the Respondent has filed one private criminal complaint and one police case against the Appellant. In the private complaint, even the brothers and sister of the Appellant were made accused and in the police case, the Appellant had to spend 8 days in custody.

Significantly, both these cases have resulted in acquittal. Though in respect of the case under Section 498A of the IPC, the Appeal is pending before this Court, the fact remains that the competent Trial Courts have found that the Appellant or his brothers and sister have not committed the offences alleged by the Respondent. These facts themselves show that the Appellant has suffered harassment and ignominy of having been taken in custody for 8 days. That certainly would amount to cruelty, particularly when the allegations were proved to be false and unsubstantiated. The dismissal of the earlier petition for divorce filed by the Respondent has its own significance. In the said petition, the Respondent had already made allegations in respect of the adulterous life of the Appellant and his assaulting the Respondent under influence of liquor. The Respondent has not pursued the said petition and the same was dismissed. Thereafter, the Respondent has not taken any steps for setting aside the said order and hence that order has attained finality, meaning thereby the Respondent was not entitled for divorce on the ground of cruelty as the Appellant was residing with another woman in adultery and was assaulting her under influence of liquor. The Appellant was acquitted from both the criminal cases. Thus, all these 3 proceedings show that the Respondent had made false allegations against the Appellant.

11. As far as the Voter's list at Exh.31 is concerned, Mr. Akerkar has rightly submitted that to make any allegation and for recording any finding thereon, it was necessary that the lady in question should have been made a party in the proceeding before the

Family Court. In her absence, no finding could have been recorded against her and consequently against the present Appellant. Moreover, the Respondent has not brought on record as to how those entires came into existence. None from the concerned authority preparing the electoral roll was examined. None of the neighbours of the Appellant was examined to prove his living with that lady. In these circumstances, we are not willing to accept that the Respondent has led sufficient evidence to enable the Court to hold that the Appellant was living in adultery with another woman.

12. Mr. Sankpal, the learned Counsel for the Respondent, has submitted that the Respondent was opposing the grant of a Decree of divorce as mentioned earlier. The Respondent's status as the wife of the Appellant was important for her in her old age for various benefits. We are of the opinion that this cannot be a ground or circumstance which should be taken into consideration while deciding this Appeal. The Appeal has to be decided on the basis of the evidence led by the parties and its consideration in accordance with law. The ground of sympathy cannot be a consideration for deciding the Appeal.

13. We find that the learned Judge has erred in observing that the Appellant should have specified whether the contents of the complaint were totally false and that he should have specified as to what were the real facts in respect of which the complaints were made. The Appellant has pleaded in his Petition as well as mentioned

in his evidence that the Respondent had lodged frivolous and vexatious complaints at the police station and also in the Court. Since it is his case that the complaints were false, he could not have elaborated about the incidents which were false. Therefore, the observation of the learned Judge in that regard is not correct.

14. Mr. Akerkar, the learned Counsel for the Appellant, rightly relied on the decision of *Naveen Kohli* (*supra*). The Hon'ble Supreme Court has held in the said Judgment that it was difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. The Hon'ble Supreme Court has further observed that the Courts should consider the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in proper perspective.

15. Thus, applying this ratio to the present facts, we are of the opinion that because of the unreasonable criminal proceedings initiated by or at the instance of the Respondent, the Appellant had suffered tremendous mental agony and it was not possible for him to cohabit with the Respondent. Her continuous complaints to the Appellant's employer also jeopardized his prospects in his

employment. Since the cross-examination of the Respondent shows that she was blaming the Appellant for her not being able to conceive, that, also amounts to cruelty meted out to the Appellant.

16. Thus, we are of the considered opinion that the Appellant has made out sufficient case for grant of divorce on the ground of cruelty. The learned Trial Judge has not considered any of these factors in proper perspective and therefore, the said Judgment and Order is required to be set aside.

17. Mr. Akerkar, the learned Counsel for the Appellant, on the instructions of the Appellant who was present in the Court, has fairly stated that the Appellant would continue paying the maintenance to the Respondent, which he is paying at present. Mr. Akerkar further stated that the Appellant would not raise any dispute in respect of the flat i.e. Flat 108, 1st Floor, Maheshwari Ganesh Kunj CHS Ltd., Kondivita, J. B. Nagar, Andheri (East), Mumbai – 400 059 occupied by the Respondent at present, during her lifetime. Hence the following order.

ORDER

- (i) The Appeal is allowed.
- (ii) The Judgment and Order dated 07/05/2010 passed by the learned Judge of Family Court No.4, Mumbai, is set aside.
- (iii) The marriage between the Appellant and the Respondent is dissolved under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

- (iv) The Appellant shall continue to pay the maintenance to the Respondent, which he is paying presently.
- (v) The Appellant shall not raise any dispute against the Respondent in respect of the flat occupied by the respondent which is Flat 108, 1st Floor, Maheshwari Ganesh Kunj CHS Ltd., Kondivita, J. B. Nagar, Andheri (East), Mumbai – 400 059, during her lifetime.
- (vi) Decree be drawn accordingly.

(SARANG V. KOTWAL, J.)

(K. K. TATED, J.)

18. At this stage, the learned Counsel appearing for the Respondent – Wife applied for stay of the operation and implementation of this Order.

19. Considering the facts and circumstances of the present case, the Order is stayed for a period of 12 weeks.

(SARANG V. KOTWAL, J.)

(K. K. TATED, J.)